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Summary record of the second part (public)* of the 3525th meeting
Held at the Palais Wilson, Geneva, on Thursday, 26 July 2018, at 10 a.m.

Chair: Ms. Cleveland (Vice-Chair)

Contents

Organizational and other matters, including the adoption of the report of the working group on individual communications (*continued*)

Draft general comment No. 36 on article 6 of the Covenant (Right to life) (*continued*)

* The summary record of the first part (closed) of the meeting appears as document CCPR/C/SR.3525-CAT/C/SR.1660.

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Ms. Cleveland (Vice-Chair) took the Chair.

The public part of the meeting was called to order at 12.15 p.m.

Organizational and other matters, including the adoption of the report of the working group on individual communications (*continued*)

Draft general comment No. 36 on article 6 of the Covenant (Right to life) (*continued*) (CCPR/C/GC/R.36/Rev.7)

1. **The Chair** invited the Committee to resume the second reading of its draft general comment No. 36 on article 6 of the International Covenant on Civil and Political Rights (Right to life), beginning with paragraph 45.

Paragraph 45

2. **Mr. Shany** said that the paragraph dealt with the interplay between violation of due process and fair trial guarantees, and the potential arbitrariness of imposition of the death penalty. The Committee had taken the position that such violations might, but did not necessarily, render the death sentence arbitrary in nature. The Government of Japan had requested the deletion of the reference to preliminary hearings and the Government of the Russian Federation had taken the view that the monitoring of procedural aspects of criminal investigations fell within the remit of domestic courts. The Government of the Netherlands had objected to the reference to handcuffing, arguing that handcuffing of a violent suspect during trial did not constitute a violation of article 14. He was nevertheless disinclined to heed those requests, as the nature of the paragraph was not overly prescriptive and did indeed allow for consideration of the context and circumstances. The Committee had consistently held the view that it was within its mandate to monitor the implementation of due process guarantees by domestic courts and that handcuffing suspects during trial could constitute a violation of the right to the presumption of innocence.

3. The Cornell Center on the Death Penalty Worldwide had requested the inclusion of a reference to the obligation of States to provide adequate time and facilities for the preparation of a defence. Human Rights Watch and the International Disability Alliance had requested that the Committee address due process implications for persons with disabilities, and Reprieve had proposed the inclusion of a reference to victims of trafficking.

4. In light of the proposals, the phrase "lack of adequate time and facilities for the preparation of the defence, including" should be inserted before "inability to access legal documents". A reference to the "failure to provide accessible documents and procedural accommodation for persons with disabilities" should be added after "lack of suitable interpretation". A specific reference to trafficking victims would be inappropriate, given the general nature of the paragraph.

5. **Ms. Waterval** said that she supported the amendments proposed by Mr. Shany.

6. *Paragraph 45, as amended, was adopted.*

Paragraph 46

7. **Mr. Shany** said that the Government of Japan had suggested that the connection between procedural flaws and the application of the death penalty was often tenuous, and that it was therefore an overly strict interpretation to say that such flaws could violate article 6 (1) of the Covenant, rather than that they might do so in certain circumstances. He proposed to accommodate that concern by amending "can violate" to read "may violate", at the end of the paragraph. The Government of the United States had commented that the Vienna Convention on Consular Relations did not grant the individual a right to consular notification. However, for the purposes of the general comment, the Committee was not required to take a stand on that matter. Pursuant to article 31 (3) (c) of the Vienna Convention on the Law of Treaties, the Committee could consider all relevant obligations of States when addressing the arbitrariness of their conduct under article 6 of the Convenant. Consular notification was an obligation of States parties to the Vienna Convention on Consular Relations. Failure to meet a relevant treaty obligation could affect

the due process rights of the individual and the outcome of the person's case, thus giving rise to arbitrariness, in violation of article 6.

8. **Mr. Heyns**, supported by **Mr. Shany**, proposed that the article of the Vienna Convention on Consular Relations cited in the text, namely article 36, should be referenced in a footnote.

9. *Paragraph 46, as amended, was adopted.*

Paragraph 47

10. **Mr. Shany** said that the Government of Japan had suggested that the reference to "reliable studies" was unclear and should be changed to "scientific studies". He invited the Committee to consider that proposal. On the basis of a submission from Advocates for Human Rights, he proposed amending the second sentence to assert that States parties must review procedural barriers to the reconsideration of convictions. The Cornell Center on the Death Penalty Worldwide had made a number of proposals, but they were too specific for such a general paragraph.

11. **Ms. Brands Kehris** said that she supported the proposed addition addressing procedural barriers. The word "scientific", however, should be avoided, as it could be interpreted too broadly. In some countries, it was not understood to encompass the social sciences and qualitative studies, which should not be excluded.

12. **Mr. Santos Pais** proposed that the words "for instance" should be inserted after "reliable studies".

13. **Mr. Shany** said that he agreed with the point raised by Ms. Brands Kehris and that the wording "reliable studies" should be retained. The paragraph would be amended to accommodate the amendments proposed by Advocates for Human Rights and Mr. Santos Pais.

14. *Paragraph 47 was adopted, subject to the agreed amendments.*

Paragraph 48

15. **Mr. Shany** said that the Government of the Russian Federation had suggested that the paragraph should state that the collated data might be indicative of prejudice against different groups, rather than of the "unequal application" of the death penalty. In the light of that concern, he proposed amending the paragraph so that it stated simply that the data raised concerns when read in conjunction with article 6. Reprieve had suggested that paragraph 48 should address the issue of foreigners sentenced to death for drug offences. However, that issue was too specific for the paragraph.

16. **The Chair** said that the paragraph already referred to foreign nationals.

17. **Mr. Politi** said that he supported Mr. Shany's proposal. If a reference to unequal application was retained, it would have to be made clear that such unequal application resulted from some form of discrimination, in line with the Russian proposal. On balance, simplifying the paragraph might be more appropriate.

18. **Mr. Santos Pais** proposed changing the order of the sentences in the paragraph so that the second sentence would come first.

19. **Ms. Brands Kehris** said that she could not support Mr. Shany's proposal to simplify the paragraph. The Committee's concern was that prejudice and stereotypes played a role in the application of the death penalty. A simplified paragraph would miss that point.

20. **The Chair** said that "unequal application" encompassed the narrow concern of prejudice and stereotyping, but also captured other forms of inequality.

21. **Ms. Kran** said that the language on the unequal application of the death penalty should be retained. Perhaps the words "in practice" should be deleted, however.

22. **Mr. Shany** said that, in the light of the Committee's discussion, the end of the second sentence should now assert that the data "may indicate an unequal application of the

death penalty, which raises concerns under article 2 (1), read in conjunction with article 6, as well as under article 26".

23. *Paragraph 48, as amended, was adopted.*

Paragraph 49

24. **Mr. Shany** said that the Government of Canada had expressed concern about the assertion that military courts were not sufficiently independent or impartial to try capital crimes. In addition, an anonymous humanitarian organization had objected to the assertion that civilians should never be tried by military courts, noting that, under the Geneva Convention relative to the Protection of Civilian Persons in Time of War, civilians were expected to be tried before military tribunals in certain circumstances. Such concerns could be accommodated by deleting the third sentence altogether and amending the fourth sentence by replacing "should not, as a rule" with "can only", and deleting "other than a civilian court". An anonymous NGO had indicated that the term "tribal courts" was offensive. He asked whether the Committee members had suggestions for a more appropriate term. Lastly, he proposed deleting "the most serious" before "capital crimes", in the penultimate sentence.

25. **Ms. Waterval** said that she supported Mr. Shany's proposed deletions and proposed that "such as tribal courts" should also be deleted.

26. **Mr. Heyns** said that, although he would have liked to retain the original language regarding military courts, in the light of the provisions of international humanitarian law, it should be amended. He supported the deletions proposed by Mr. Shany and Ms. Waterval.

27. **Mr. de Frouville** said that he supported the proposed deletion of the third sentence. However, the paragraph should emulate the firm language used in the Committee's recent jurisprudence by asserting that civilians must not, rather than should not, be tried for capital crimes by military tribunals, unless the very specific circumstances provided for by international humanitarian law were applicable.

28. **Mr. Koita** said that, if the Committee decided to go along with Mr. Shany's proposals, perhaps the word "generally" could be deleted from the middle of the second sentence. He was not opposed to the deletion of "such as tribal courts". However, the Committee should not lose sight of the significant effect that the commutation of the death sentence had on the families of victims. For those families, a pardon or amnesty for persons sentenced to death, or the commutation of the death sentence, was often subject to bargaining and negotiations that were extremely cumbersome and stressful and that often took place without the involvement of the State and the competent courts. That concern might be implicit in the paragraph, but it could be expressed in stronger terms.

The meeting rose at 1. p.m.